di-Pertuan Agong to require an officer to retire in any of the circumstances described in paragraphs (a) to (h), which for the most part correspond with similar paragraphs in section 8(2). Paragraph (d) of section 10 reads: —

"(d) on the termination of his employment in the public interest."

It is this provision that is referred to in section 8(2)(f).

Compulsory retirement under section 10(d) would have made the appellant eligible for a pension at the same rate as if he had retired by reason of ill-health — subject however to the right of the Yang di-Pertuan Agong to reduce or withhold the pension under section 5(2); but only if he were satisfied that the appellant had been guilty of negligence, irregularity or misconduct. So the letter of July 29, 1970, notifying the Secretary of the Ministry of Justice that the appellant's pension was to be subject to a deduction of 10% from the amount for which he would have been eligible if he had retired by reason of ill-health, compels the conclusion that this was done in exercise of the powers conferred upon the Yang di-Pertuan Agong by section 5(2). From this it follows that the Government must have been satisfied when they terminated his service that the appellant had been guilty of negligence, irregularity or misconduct in his office.

In their Lordships' view it is a necessary inference of fact from this that the termination of the appellant's service at a reduced rate of pension involved an element of punishment and was connected, at any rate in part, with conduct on his part in relation to his office which the Government regarded as unsatisfactory or blameworthy. The two criteria of dismissal in the relevant sense are satisfied and, in their Lordships' view, what the Government purported to do was to dismiss the appellant within the meaning of Article 135(2) of the Constitution and to do so without having given him a reasonable opportunity of being heard. This is prohibited by the Constitution and the purported termination of the appellant's service by the Government is void.

No other step has since been taken to terminate the appellant's service or to require him to retire, although he has now reached an age at which he could be compelled to do so. Accordingly he has continued to be a member of the public service of the Federation and will remain so until he is required to retire. He has continued to be entitled to draw the salary appropriate to the office that he held when his service was purportedly terminated, but is liable to account for the monies he has received purportedly by way of pension. Declarations to this effect were made by the High Court in Malaya but were set aside by the Federal Court.

Their Lordships will accordingly report to His Majesty the Yang di-Pertuan Agong their opinion that this appeal should be allowed, the order of the Federal Court set aside and the judgment of Narain Sharma J. in the High Court in Malaya restored. The respondent should pay the costs of the appeal to the Federal Court and of this appeal.

Appeal allowed.

Solicitors: *Stephenson Harwood; Waltons & Morse.*

PORT SWETTENHAM AUTHORITY v. T.W. WU AND COMPANY (M) SDN. BHD.

[Privy Council (Lord Wilberforce, Viscount Dilhorne, Lord Salmon, Lord Fraser of Tullybelton and Sir Garfield Barwick) April 4-7, 10 and June 19, 1978]

[Privy Council Appeal No. 6 of 1976]

Contracts — Bailment — Duties and responsibilities of bailee — Loss of goods after they were unloaded at wharf — Whether port authority liable — Burden of proof — Reference to English Law — Evidence Act, 1950, s. 106 — Civil Law Act, 1956, s. 3 — Contract Act, 1950, ss. 104, 105 and 114.

Port Authority — Bailee — Limitation of liability — By-law made by Port Authority ultra vires — Port Swettenham Port Authority By-laws 1965, By-law 91(1) — Port Authorities Act, 1963, s. 29.

Administrative Law — Subsidiary legislation — By-laws ultra vires — Port Swettenham Port Authority By-laws, 1965, By-law 91(1) — Port Authorities Act, 1963, s. 29.

The facts in this case were that 93 cases of pharmaceutical goods had been unloaded at Port Klang and kept in the custody of the Port Authority (the appellants). Subsequently only 29 cases were collected by the respondents and some of the contents of the missing cases were recovered in shops in Kuala Lumpur. The respondents brought an action against the appellants for breach of contract and/or conversion of the remaining 64 cases. The learned trial judge (Abdul Hamid J., [1975] 1 M.L.J. 15) found that the onus lay on the appellants to prove that the goods had not been lost because of their negligence or misconduct or that of their servants, and that they had failed to discharge that onus. Accordingly he gave judgment for the respondents. The appellants' appeal to the Federal Court was dismissed ([1975] 2 M.L.J. 73). The appellants appealed.

Held: (1) the onus is upon the appellants under sections 104 and 105 of the Contract Act to prove that they had taken as much care of the respondents' goods as a Port Authority of ordinary prudence would under similar circumstances have taken of its own goods of the same bulk, quality and value as the 64 lost cases;

(2) if there is nothing in the provisions of the Contract Act to establish with certainty whether the onus is upon the bailor to prove the default or upon the bailee to disprove it, those provisions must be interpreted in the light of the common law;

(3) at common law the onus is always upon the bailee, whether he be a bailee for reward or a gratuitous bailee, to prove that the loss of any goods bailed to him was not caused by any fault of his or of any of his servants or agents to whom he has entrusted the goods for safe keeping. Accordingly the onus of proving that the loss of the goods deposited with the appellants in this case, was not caused by the negligence or misconduct of their servants, lay on the appellants;

(4) the appellants in this case have failed to discharge the onus which lay upon them;

(5) By-law 91(1) of the Port Swettenham Authority By-laws, 1965 is invalid as it is *ultra vires* section 29(1)(g) of the Port Authorities Act, 1963, in so far as it purported to limit the Port Authority's liability in respect of a loss occurring with the actual fault or privity of the Authority; and also because it did not only limit but wholly excluded the liability of the Port Authority for the loss of any goods caused by their own misconduct or negligence.

Cases referred to:-

(1) *Lee Heng* v. *Port Swettenham Authority* [1971] 2 M.L.J. 27 at p. 29.

(2) *Kush Kanta Barkakati* v. *Chandra Kanta Kankati* (1923) 28 C.W.N.; 83 I.C. 151.

(3) *Giblin* v. *McMullen* (1868) L.R. 2 P.C. 317.

(4) *Lloyd* v. *Grace, Smith & Co.* [1912] A.C. 716.

(5) *Hunt and Winterbotham Ltd.* v. *B.R.S.* [1962] 1 Q.B. 617.

(6) *Dwarka Nath* v. *R.S.N. Co. Ltd.* A.I.R. 1917 P.C. 173.
(7) *Cheshire* v. *Bailey* [1905] 1 K.B. 237.
(8) *Morris* v. *C.W. Martin and Sons, Ltd.* [1966] 1 Q.B. 716, p. 740.
(9) *Lennard's Carrying Co. Ltd.* v. *Asiatic Petroleum Co.* [1915] A.C. 705, 715.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

John Vinelott Q.C. and *M. Potter* for the appellants.

J.S. Hobhouse Q.C., M. Havelock-Allen and *C.W.M. Abrahams* for the respondents.

Lord Salmon (delivering the judgment of the Board): A consignment of 93 cases of pharmaceutical goods was shipped, under two bills of lading dated March 28,1970, on board the vessel "Sansei Maru" for carriage from Hong Kong to Port Kelang (Port Swettenham) in Malaysia. The bills of lading nominated the plaintiffs (respondents in this appeal) as consignees. The "Sansei Maru" arrived at Port Swettenham on April 5, 1970. The learned trial judge found as a fact

1. that on that day, all the 93 cases were unloaded on to the wharf and passed into the custody of the Port Authority (the defendants) who transferred them into Shed No. 8; and
2. that on April 8 the Chief Forwarding Clerk of the plaintiffs' forwarding agents and a Customs' Officer inspected and accounted all of the 93 cases in Shed No. 8, and
3. that the inward cargo charges and Customs duty were paid in respect of each of the 93 cases on the following day.

By April 15, 1970 only 29 of the 93 cases could be found. The balance of 64 cases weighing about 5.65 tons had disappeared. The defendants at first contended that the 64 cases had been short-landed and therefore had never been in their custody. Their Counsel, however, abandoned this contention at the trial after having heard the evidence adduced on behalf of the plaintiffs.

No. 8 Shed was about 400 feet long and 100 feet wide. It had eight doors in front and eight doors behind. It was in the charge of a Chief Clerk who had a number of other clerks to assist him in looking after the contents of the shed. They worked in three shifts around the clock. None of them was called as a witness at the trial. The doors in front of the shed faced the ship, and cargo was taken by the defendants' servants from the ship's side and transported by forklift and pallets to the shed — a distance of about 40 feet. It was admitted on behalf of the defendants that they had no system for counting any of the cases brought into the shed. At no time did the defendants have any idea of how many cases the shed should have contained. Cargo was usually kept in the shed for up to three days and then if not delivered to the consignee within that period transferred into the warehouse. Whilst the goods were kept in the shed, no extra fees were charged for this was all part of the service offered by the defendants and covered by the inward cargo charges. If and when the cargo was transferred to the warehouse, then extra dues were charged as long as the cargo remained there.

It is obvious that the missing 64 cases, weighing over 5 tons, could not have been taken out of the defendants' custody save by loading them on to a vehicle. Some of the contents of the cases were later found in a local chemists' shop. It is obvious that goods of this bulk and weight could not have been spirited out of the defendants' custody if due care for their safety had been taken by the servants into whose care the goods had been entrusted by the defendants for safe keeping.

The learned trial judge found that the onus lay upon the defendants to prove that the goods had not been lost because of their negligence or misconduct or that of their servants: and that they had failed to discharge that onus. Accordingly he gave judgment for the plaintiffs for $21,236.84 being the undisputed value of the missing 64 cases.

The defendants' appeal from that judgment to the Federal Court of Malaysia was dismissed, and they now appeal to this Board from the decision of the Federal Court.

The law in relation to bailment is set out in sections 104 and 105 of the Contracts (Malay States) Ordinance of 1950 which read as follows:—

"104. In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality, and value as the goods bailed.

105. The bailee, in the absence of any special contract, is not responsible for the loss, destruction, or deterioration of the thing bailed, if he has taken the amount of care of it described in section 104 of this Ordinance."

It will be observed that these sections apply to all bailments and make no distinction between bailments for reward and gratuitous bailments.

Their Lordships consider that the onus is upon the defendants under sections 104 and 105 to prove that they had taken as much care of the plaintiffs' goods as a Port Authority of ordinary prudence would, under similar circumstances, have taken of its own goods of the same bulk, quality and value as the 64 lost cases. See *Lee Heng* v. *Port Swettenham Authority*,(1) and *Indian Contract and Specific Relief Acts* by *Pollock and Mulla* 6th ed. at page 521 in which the learned authors, who are generally regarded as authorities of great weight, state:

"In cases governed by the provisions of sections 151 and 152, [which correspond exactly with sections 104 and 105 (*ibid.*)] the loss of damage of goods, entrusted to a bailee is *prima facie* evidence of negligence, and the burden of proof, therefore, to disprove negligence lies on the bailee."

Their Lordships respectfully agree with this statement of the legal position. It has, however, been argued on behalf of the defendants that neither sections 104, 105 nor 114 spell out that the onus lies upon them to prove that they took the degree of care specified in section 104 in respect of the 64 missing cases. Section 114, for example, reads —

"If, *by the default of the bailee*, the goods are not returned, delivered, or tendered at the proper time, he is responsible to the bailor for any loss ... of the goods from that time."

If there is nothing in the sections to establish with certainty whether the onus is upon the bailor to prove the default, or upon the bailee to disprove it, these

sections must be interpreted in the light of the common law. *Pollock and Mulla*, however, comment upon section 161 of the Indian Contract Act (which is in exactly the same terms as section 114) at page 531, 6th ed., as follows:—

"Unexplained failure to return the thing bailed is presumed to be by the bailee's default."

For this proposition they cite an Indian authority, *Kush Kanta Barkakati* v. *Chandra Kanta Kakati*,[2] where, as they rightly say,

"the English authorities on which this section is founded are cited at some length."

The Civil Law Act, 1956, provides:

"3(1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the court shall

(a) in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7th day of April, 1956."

It is true that Malaysian law sets a single standard of care for all bailees — whether they are bailees for reward or gratuitous bailees — and it corresponds to the standard required of a gratuitous bailee at common law. This standard, although high, may be a less exacting standard than that which the common law requires of a bailee for reward. But the line between the two standards is a very fine line, difficult to discern and impossible to define. After all, a man of ordinary prudence would presumably take reasonable care of his own goods. However this may be, there is no doubt that under Malaysian law interpreted in the light of the common law, as it always has been by the Malaysian courts and by this Board, the onus is on the bailee to show that he has taken the care required by the law, of the goods entrusted to him.

Their Lordships recognise that, under the common law, there is some authority for holding that, in the case of a gratuitous bailment, the onus of proving that the loss of goods bailed was caused by the negligence or misconduct of the bailee rests upon the bailor; see *Giblin* v. *McMullen*[3] (who represented the Union Bank of Australia) upon which the defendants relied. Their Lordships however gravely doubt whether that case was correctly decided. There is no compelling authority that a gratuitous bailee who fails to return the goods left in his custody is not obliged to explain why he is not able to return them and to show that their loss is not due to his failure to have taken as much care of the goods as a man of ordinary prudence would have taken of his own goods in similar circumstances. In any event, a bank, which offers its customers, in the ordinary course of business, the service of looking after goods deposited with it, can hardly be described as a gratuitous bailee. The bank must realise that were it to refuse a customer such a service it would probably lose the customer who would have no difficulty in finding another bank which would be happy to render the service which is normally offered by banks to their customers. Moreover, in *Giblin* v. *McMullen* the plaintiff had deposited a box containing valuable securities with the defendant bank for safe custody and one of the bank's cashiers (who was employed to look after boxes deposited with the defendant bank) had stolen certain debentures from the box. That case was decided long before *Lloyd* v. *Grace, Smith & Co.*[4] in days when it was still thought to be the law that a master could not be liable to his customer for a theft by his own servant in any circumstances except when the master benefited from or connived at the theft.

The undisputed facts of the present case already recited in this judgment establish that the defendants were clearly bailees for reward. However this may be, in their Lordships' view the onus is always upon the bailee, whether he be a bailee for reward or a gratuitous bailee, to prove that the loss of any goods bailed to him was not caused by any fault of his or of any of his servants or agents to whom he entrusted the goods for safe keeping. Accordingly the onus of proving that the loss of the goods deposited with the defendants for safe custody was not caused by the negligence or misconduct of their servants in the course of their employment, without any doubt, lies on the defendants. *Hunt and Winterbotham Ltd.* v. *B.R.S.*[5]—

"If an owner of goods leaves them with another person who undertakes to mind them for reward, and then fails to produce them when they are wanted, it is a reasonable inference, in the absence of any explanation, that he cannot have looked after them properly: in other words, that he has at least been negligent. Accordingly, it is right to say in such a case ... that it is for the depositee to show that he has not been negligent ..."

per Donovan L.J. at p. 635.

Great reliance was placed by the defendants upon a passage in a judgment of this Board given by Sir Walter Phillimore in *Dwarka Nath* v. *R.S.N. Co. Ltd.*[6] In that case a vessel belonging to the defendants, laden with a cargo of jute belonging to the plaintiff, was moored to two buoys in a river. Another vessel was moored alongside and fastened to the same two buoys. This latter vessel caught fire which spread to the defendants' vessel, and although this vessel ultimately got clear and was towed down the river, the greater part of the cargo of jute was destroyed. The plaintiff sued the defendants as bailees for not taking proper care of the cargo by getting away from the fire more quickly than they did. The case was decided in favour of the defendants on the ground that they were faced with a sudden emergency of extreme peril and difficulty, and the fact that in the agony of the moment, they took a course which turned out not to be the best which they could have taken did not amount to negligence.

The passage in Sir Walter Phillimore's judgment, on which the defendants rely, reads as follows:—

"It is true that under the Evidence Act of 1872, section 106, [which corresponds with section 106 of the Malaysian Evidence Act, 1950, as revised in 1971] 'when any fact is especially within the knowledge of any person, the burden of proving the fact is on him;' and it was therefore right that the defendant Company should call the material witnesses who were on the spot ... But this provision of the law of evidence does not discharge the plaintiffs from proving the want of due diligence, or ... the negligence, of the servants of the defendant Company.

It may be for the Company to lay the materials before the court; but it remains for the plaintiffs to satisfy the court that the true inference from these materials is that the servants of the defendant Company have not shown due care, skill and nerve." (p. 175).

Their Lordships with great respect are unable to accept that passage (which having regard to the

decision was entirely obiter) as correctly stating the law in relation to the onus of proof which lies upon a bailee.

In their Lordships' view the defendants have conspicuously failed to discharge the onus which lay upon them. They called only two witnesses, and those witnesses knew nothing at all about the lost goods. They spoke of nothing except the nature of the system and security measures which the defendants adopted for taking care of the goods committed to their custody. Both the learned trial judge and the Federal Court took the view that the system of control and the security measures left much to be desired and should have been tightened up. Their Lordships consider that there was every justification for that view. In particular, it seems most unfortunate that no record was kept of the goods which were stored in Shed No. 8 for safe custody; and this, of course, must have been known to the defendants' servants whose role it was to look after these goods whilst in the shed. Even if the system and security precautions had been perfect, the best of systems sometimes breaks down through the human factor, viz. through negligence or misconduct on the part of those who are employed to work it. The defendants elected not to call as witnesses any of the men working in the shed whose duty it was to safeguard the goods — not even the man in charge of the shed. There was accordingly no evidence that these men had taken due care of the goods or that the 64 cases had not been lost as a result of their negligence or misconduct. For the reasons already stated, it seems virtually certain that the cases were stolen and could not have been stolen without the negligence or misconduct of the defendants' servants who were employed to keep them in safe custody. When a bailee puts goods which have been bailed to him in the care of his servants for safe custody, there can be no doubt that the bailee is responsible if the goods are lost through any failure of those servants to take proper care of the goods. The heresy that any dishonest act on the part of a servant employed to take care of the goods is necessarily outside the scope of his employment, and that the master cannot be liable for the dishonest act unless done for his benefit or with his privity, was exorcised by *Lloyd* v. *Grace, Smith & Co., supra.* It was on the basis of this heresy that *Cheshire* v. *Bailey*[7] laid down the startling proposition of law that a master who was under a duty to guard another's goods was liable if the servant he sent to perform the duty for him performed it so negligently as to enable thieves to steal the goods, but was not liable if that servant joined with the thieves in the very theft. This proposition is clearly contrary to principle and common sense, and to the law. (*Morris* v. *C.W. Martin and Sons Ltd.*[8]).

Their Lordships agree with the decision in *Morris* v. *C.W. Martin and Sons Ltd.* and consider that *Cheshire* v. *Bailey* mis-stated the common law.

It is now necessary to turn to by-law 91(1) of the Port Swettenham Authority By-Laws, 1965, made by the Port Swettenham Authority with the approval of the Minister and in exercise of the powers conferred by section 29 of the Port Authorities Act, 1963.

The defendants relied strongly upon this by-law which, so far as material, reads as follows:—

"The Authority shall not be liable for any loss... of goods ... from any cause unless such loss... has been caused solely by the misconduct or negligence of the Authority or its officers or servants."

It was at one time suggested on behalf of the defendants that this by-law altered the onus of proof and put the onus upon the plaintiffs to prove that the loss of the missing 64 cases had been caused solely by the misconduct or negligence of the Authority or its officers or servants. It is unnecessary to make any comment about this submission save that it was attractively presented but is without substance. Even if the submission were right it would only afford an added reason for finding the by-law invalid in that it purported to alter the general law.

The defendants, however, relied on the by-law mainly for the proposition that if the goods were stolen as the result of misconduct or negligence of the defendants, their officers or servants, it could not be said that their loss was caused solely by that misconduct or negligence since it was also caused by the criminal conduct of the thieves who stole them. In their Lordships' view, the by-law is *ultra vires* section 29(1)(g) of the Port Authorities Act, 1963. That section, so far as relevant, reads as follows:—

"29(1) The authority may with the approval of the Minister make by-laws for —

(g) limiting the liability of the authority in respect of any loss... occurring without the actual fault or privity of the authority...."

Clearly, any by-law which purports to limit the Authority's liability in respect of a loss occurring with the actual fault or privity of the Authority would be *ultra vires;* and that is precisely what by-law 91(1) does. It distinguishes between the misconduct or negligence of the Authority itself and that of its servants for which it is also responsible. If anyone who could properly be described as the alter ego of the Authority, for example, its managing director, had been privy to the theft of the 64 missing cases, this would constitute a loss occurring with the actual fault or privity of the Authority (see *Lennard's Carrying Co. Ltd.* v. *Asiatic Petroleum Co. Ltd.*[9]), yet the defendants would be exempt from liability because the loss would have been caused partly by the actual thieves and therefore not solely by the fault of the Authority. There is, however, no power under section 29 to make a by-law which limits the liability of the Authority in respect of any loss occurring with its actual fault or privity. The by-law, in their Lordships' view, would also be *ultra vires* because it does not only limit, it wholly excludes, the defendants' liability for the loss of any goods caused by their own misconduct or negligence; and section 29(1)(g) of the Act of 1963 confers no power to exclude but only to limit liability. Further, in their Lordships' opinion, the defects in the by-law cannot be cured by striking out any part of it.

For these reasons, their Lordships will advise His Majesty the Yang di-Pertuan Agong that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors: *Stephenson Harwood; Waltons & Morse.*